No. 97-1362

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

FRANK BARRETT,

Petitioner,

vs.

NANCY I. HARRINGTON a/k/a Penny Harrington,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a judge's instigation of a criminal investigation against a disgruntled litigant, taken to protect the integrity of the judicial system, is a "judicial act" and therefore entitled to absolute judicial immunity.

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For the Court's convenience, in this opposition brief, citations to the opinion of the United States Court of Appeals for the Sixth Circuit (reported at 130 F.3d 246 (6th Cir. 1997)), and the order and memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division (unreported, filed July 31, 1996), will be to the page numbers of these documents attached to the Petition as App. pp. 1-44 and App. pp. 45-71, respectively. Citation to these opinions will occur as "Pet. App." followed by the appropriate page number(s).[1]

COUNTERSTATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites the First Amendment to the United States Constitution, 42 U.S.C. § 1983, and Tennessee Code Annotated § 27-5-108 (1980) as the constitutional and statutory provisions involved in the matter before this Court. Respondent respectfully disputes the applicability or relevance of Tennessee Code Annotated § 27-5-108 to the determination of the instant petition as the reasoning, basis for, and the holding of that portion of the opinion at issue neither considers nor depends upon this state statute.

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1. Citations to other documents attached to the Petition will occur as "Pet. App." followed by the appropriate page number(s). Citations to the Petition will occur as "Pet." followed by the appropriate page number(s). Citations to relevant documents attached to this brief in opposition will occur as "App." followed by the appropriate page number(s). Citations to the record will occur as "R." followed by the docket number, the description given to the document, and appropriate page number(s).

INTRODUCTION

The petitioner, Frank Barrett, petitions this Court to issue writ of certiorari and grant plenary review of the decision by the Court of Appeals granting absolute immunity to the respondent, Judge Penny Harrington, related to her contacting state and federal prosecutors on her judicial letterhead to prompt an investigation into obstruction of justice charges. Petitioner alleges that this portion of the opinion of the Court of Appeals represents an extension of the doctrine of absolute judicial immunity that is unwarranted by the decisions of this Court and those of several United States Courts of Appeal. In the alternative, petitioner requests this Court to issue writ of certiorari, vacate the opinion of the Court of Appeals, and remand to the Court of Appeals for further consideration in light of *Kalina v. Fletcher*, 522 U.S. __, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

As detailed below, the Petition presents no issues that warrant either this Court's plenary review of the decision by the Court of Appeals or the necessity to vacate and remand to the Court of Appeals for further consideration. First, contrary to petitioner's assertion, the decision by the Court of Appeals does not conflict with relevant decisions by this Court because it correctly construes and applies the "two-prong" test established and followed by this Court in *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), and its progeny, in the determination that the acts in question were "judicial acts" entitling respondent to absolute judicial immunity. Related to that analysis, petitioner's statement of the case is misleading in its selective omission of certain uncontroverted and material facts upon which the Court of Appeals relied in its decision. In addition, petitioner misstates the analysis and reasoning of the Court of Appeals. Second, contrary to petitioner's assertion, the decision by the Court of Appeals does not conflict with

decisions of other United States court of appeals or with previous decisions of the Sixth Circuit Court of Appeals. Third, because petitioner's presentation of the holding in *Kalina v. Fletcher*, *supra*, is clearly incorrect and misleading, his reliance on this case is misplaced.

STATEMENT OF THE CASE

At all times material to the matter before this Court, defendant/respondent Nancy I. ("Penny") Harrington (hereinafter "Judge Harrington") has been an elected Metropolitan General Sessions Judge of Nashville and Davidson County, primarily responsible for the environmental docket. Plaintiff/petitioner Frank Barrett (hereinafter "Barrett") has been and is the owner of a roofing business that has been involved in an ongoing controversy with the Department of Codes and Davidson County regarding work permits for various projects. (Pet. App. at 2-3).

In September 1994, Barrett appeared before Judge Harrington in Environmental Court regarding two violations of the Environmental Codes. At the conclusion of a bench trial, Judge Harrington rendered judgments against Barrett. Barrett alleges that at the hearing Judge Harrington did not show appropriate respect for litigants appearing before her. He further alleges that, based upon his observations, he determined that Judge Harrington was not "fit . . . to hold public office," and he thus decided to "investigate" her in order to advocate opposition to her re-election. (Pet. App. at 3).

As part of his "investigation," Barrett visited various state and local government offices in an alleged effort to gather public information regarding Judge Harrington. On February 1, 1995, Barrett visited the Davidson County Election Commission Offices to request certain documents about Judge Harrington.

While requesting these documents from Joan Nixon, an executive secretary to the Election Commission, Barrett displayed such vehement behavior, including profanity to the extreme, that Ms. Nixon believed that Barrett posed a physical threat not only to herself and other female employees present, but also to Judge Harrington. Although Ms. Nixon did not have a personal relationship with Judge Harrington, she called Judge Harrington to notify her of Barrett's behavior. (Pet. App. at 3-4; App. at 1a-3a). At about this same time, Larry Brinton, a local television news reporter, told Judge Harrington that Barrett was very hostile towards her and suggested that she should be concerned for her safety because of Barrett's behavior and demeanor. (Pet. App. at 4).

Based primarily on these reports of Barrett's behavior, Judge Harrington believed Barrett to be a disgruntled litigant who sought to harass not only herself, but her family as well. On February 9, 1995, using her judicial letterhead, Judge Harrington wrote letters to State District Attorney General Victor S. Johnson, III and United States Attorney John Roberts, requesting that they investigate Barrett because he was "attempting to obstruct justice by harassing [her] and [her] family," including requiring her to recuse herself from future cases against him, which were likely to arise due to Barrett's ongoing dispute with the Codes Department. (Pet. App. at 4, 84-87).

Shortly after the time Judge Harrington forwarded the letters of February 9, 1995, and apparently in response to these letters, Detective Anna Marie Williams was assigned to investigate the circumstances through interviews of Judge Harrington and Frank Barrett. In the course of her interview with Barrett, Detective Williams advised Barrett that he was being investigated for stalking Judge Harrington. (Pet. App. at 5-6). Barrett admits that he "has no way of knowing whether [Judge Harrington]

was, as she claims, in fact scared." (R.15 Second Amended Complaint at p. 10, ¶ 29(d)).

Despite her continuing apprehension regarding the reported public behavior of Frank Barrett, once Judge Harrington determined that no statute fully applied to that behavior, she expressly told police not to pursue the matter and to close the file. (App. at 5a-6a). Further, it is uncontroverted that Judge Harrington has never caused a warrant or formal charge to be taken out against Barrett. (R.22 Appendix, Collective Exhibit C at pp. 172-73; Pet. App. at 83). Nonetheless, Judge Harrington has been forced to recuse herself from hearing a subsequent proceeding in the Environmental Court involving Barrett. (Pet. App. at 33).

In a complaint filed September 21, 1995,[2] Barrett brought suit against Judge Harrington pursuant to 42 U.S.C. § 1983 alleging violations of his First and Fourteenth Amendment rights. Barrett further alleged seven pendent state claims, including a claim for common-law defamation.[3] On February 14, 1996, Judge Harrington filed a motion to dismiss and a motion for summary judgment claiming, in part, that she was entitled to either absolute or qualified immunity. On this same date, Barrett moved for partial summary judgment on the merits of his claim. On July 30, 1996, the District Court determined Judge Harrington's motion to dismiss was moot. The court granted Judge Harrington's motion for summary judgment in part, finding she was entitled to qualified immunity on Barrett's claim of due process violations. However, the court denied Judge Harrington's motion related to Barrett's First Amendment

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2. Barrett was twice granted permission to amend his complaint.

3. With the exception of the common-law defamation claim, all pendent claims have been voluntarily dismissed. (Pet. App. at 47).

claim. The court further denied Barrett's motion for partial summary judgment in its entirety. (Pet. App. at 1-2, 45).

Pursuant to 28 U.S.C. § 1291, Judge Harrington appealed the denial of summary judgment related to the First Amendment claims. In its opinion filed November 20, 1997, the United States Court of Appeals for the Sixth Circuit reversed in part and affirmed in part the District Court's denial of summary judgment. The Court of Appeals held that, in view of the undisputed material facts as determined by the court, Judge Harrington's letters to state and federal prosecutors were "judicial acts" and that she was entitled to absolute immunity for such acts. The court held that Judge Harrington's communications with members of the news media were not "judicial acts" and that she was not entitled to absolute or qualified immunity for such acts. (Pet. App. at 1-44).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE COURT OF APPEALS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT RELATED TO ABSOLUTE JUDICIAL IMMUNITY FROM SUIT BROUGHT PURSUANT TO 42 U.S.C. § 1983.

A. The Court of Appeals correctly construed and applied the "two-prong" test established and followed by this Court in *Stump v. Sparkman* and its progeny in the determination that the acts in question were "judicial acts."

This Court has consistently held that judges are generally absolutely immune from civil suits for money damages, including those suits brought pursuant to 42 U.S.C. § 1983.

E.g., *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (citations omitted). This Court has specifically held that state judges are absolutely immune from liability under § 1983. *Briscoe v. LaHue*, 460 U.S. 325, 334, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Such far-reaching protection is justified "by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993).

This Court has consistently held that absolute judicial immunity is overcome in only two situations. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles*, 502 U.S. at 11-12 (citations omitted).

This Court has not expressly limited absolute judicial immunity to paradigmatic adjudicative acts formally confined within the walls of a courtroom. *See, e.g., Forrester v. White*, 484 U.S. 219, 227-28, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). Rather, this Court has consistently held that whether an action is judicial depends upon a two-prong analysis that focuses on the "nature" and "function" of the act, not the "act itself." *Mireles*, 502 U.S. at 13 (quoting *Stump v. Sparkman*, 435 U.S. at 362). This Court has further emphasized that this analysis examines "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (citing *Forrester*, 484 U.S. at 229). First, looking to the nature of the act at issue, courts must determine "whether it is a function normally performed by a judge." *Stump*, 435 U.S. at 362. Under this prong, even if a particular act is not a function normally

performed by a judge, courts are directed to "look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13. Second, regarding the expectations of the parties, courts "must assess whether the parties dealt with the judge in his or her judicial capacity." *Stump*, 435 U.S. at 362.

This Court has further held that once absolute judicial immunity is established for the conduct at issue, that immunity "is not overcome by allegations of bad faith or malice." *Mireles*, 502 U.S. at 11.

In the matter before this Court, the Court of Appeals correctly construed and applied the two-prong analysis in determining that Judge Harrington's letters to state and federal prosecuting attorneys were "judicial acts" entitling her to absolute immunity. Regarding the first prong of the *Stump* analysis, the Court of Appeals found that "the general function of Judge Harrington's conduct in writing to the prosecuting authorities was to protect the integrity of the judicial decision-making process." (Pet. App. 30). In so doing, the Court of Appeals properly recognized that under this first prong, its determination was justified because of "the nexus between the Judge's action which gave rise to the threat and her response to the threat, not simply the response itself." (Pet. App. at 31). Accordingly, the Court of Appeals found:

> Clearly, there was a direct relational nexus between Harrington's judicial decisions, Barrett's response in "investigating" and threatening her, and Harrington's response in contacting the prosecuting attorneys. Based upon what Ms. Nixon and Mr. Brinton told her that Barrett had said about her, and their expressions of concern for her safety arising out of his conduct, Judge Harrington understandably felt

> threatened by Barrett's statements, and the letters she wrote to the prosecutors were clearly designed to address and deter such conduct, and directly related to her role in adjudicating the case which engendered Barrett's conduct in the first place.[4] Just as a judge's citation for contempt against a party who obstructs justice is a judicial act taken to preserve integrity of the judicial system, so too is the instigation of criminal proceedings against a disgruntled litigant whose conduct may amount to obstruction.

(Pet. App. at 30-31). The Court of Appeals further found,

> [T]he letters did involve the "case deciding process," as the Judge wrote to express her fear that the harassment would cause her to have to recuse herself from future cases involving Mr. Barrett — recusal is undoubtedly an act that concerns judicial decision-making.

(Pet. App. at 27).

Regarding the second prong of the *Stump* analysis, the Court of Appeals found that "Barrett clearly dealt with Judge Harrington in her judicial capacity." (Pet. App. at 32). In so doing, the Court of Appeals properly recognized that under this second prong, its determination was justified because:

> Barrett's entire course of conduct was focused on Harrington's judicial role. First, he dealt with

4. As recognized by the Court of Appeals, the District Court likewise found that Judge Harrington's communications, *i.e.*, the letters at issue, were "prompted by her fear that in her role as a judge, she had aggravated a litigant such that he had developed a personal vendetta against her and that she was acting to preserve the integrity of the judicial system." (Pet. App. at 30, 54).

> Harrington in her judicial capacity when she presided over Barrett's case involving two codes violations, and it was at that time that Barrett formulated his opinion that Judge Harrington was unfit to hold office, and began his "investigation" campaign. Second, all of his activities , from his "investigation" campaign, to his comments to others about her, to the disclosure to the media of her ticket dismissals, were in response to her judicial decisions and conduct.

(Pet. App. at 32). Recognizing (1) Barrett's ongoing feud with the Department of Codes that guaranteed he would be involved in future proceedings in the Environmental Court over which Judge Harrington generally presided (Pet. App. at 2-3); (2) Judge Harrington's specific complaint in the letters at issue regarding obstruction of justice in relation to her role as a judge (Pet. App. at 30, 84-87); and (3) the fact that Judge Harrington ultimately felt compelled to recuse herself in a subsequent proceeding involving Barrett (Pet. App. at 33), the Court of Appeals reasoned:

> Even more to the point, the litigant, empowered to subject the judge to liability for reporting the [litigant's] conduct, can affect the judge's ability to sit on cases involving that litigant, thereby effectively creating a situation wherein the litigant will not have to answer to that judge or even appear before the judge. This enables the litigant to "forum shop" by effecting the recusal of a judge through the litigant's own threatening or harassing conduct.

(Pet. App. 33).

B. Barrett's statement of the case ignores certain uncontroverted material facts upon which the Court of Appeals relied and further misstates the basis for the decision by the Court of Appeals.

In his statement of the case, Barrett makes no mention of the fact that, as found by the Court of Appeals, he has been involved in an ongoing dispute with the Department of Codes Administration of the Metropolitan Government of Nashville and Davidson County, the result of this controversy being his appearing in the Environmental Court. In addition, Barrett has omitted the fact that Judge Harrington has subsequently been forced to recuse herself from a proceeding in the Environmental Court involving Barrett and resulting from that ongoing controversy, a fact noted as relevant to its decision by the Court of Appeals. (Pet. App. at 27, 33). Further, although found by the Court of Appeals to be an uncontroverted material fact and relevant to its decision, Barrett makes no reference to the messages of concern and warning by Joan Nixon and Larry Brinton to Judge Harrington in either his statement of the case or argument. (Pet. App. at 3-4, 29-33; App. at 1a-3a).

Related to his presentation of the facts, Barrett either misstates, or misunderstands, the basis for the decision by the Court of Appeals. He states,

> The Court of Appeals seems to have credited the Respondent's claim that the Petitioner *in fact* engaged in intimidating conduct which constituted or could have constituted an obstruction of justice: . . .

(Pet. at 10 (emphasis added)). He further asserts,

> If the Court of Appeals had credited Mr. Barrett's proffered evidence that he engaged in no unlawful

> conduct toward Judge Harrington, the Respondent's response cannot have been deemed reasonable.

(Pet. at 11). What Barrett does not acknowledge is that the Court of Appeals does not rest its decision on whether, in fact, Mr. Barrett engaged in intimidating conduct or unlawful conduct.[5] In addition, the Court of Appeals neither rests its decision solely on whether Judge Harrington understandably or reasonably felt threatened by Barrett's behavior. Rather, the Court of Appeals properly rests its decision upon the determination of whether (1) there existed a "direct relational nexus between Harrington's judicial decisions, Barrett's response in 'investigating' and threatening her, and Harrington's response in contacting the prosecuting attorneys," (Pet. App. at 30); and (2) "Barrett clearly dealt with Judge Harrington in her judicial capacities." (Pet. App. at 32).

Also related to his presentation of the facts, Barrett's resulting argument is flawed in several ways. First, in concluding that Judge Harrington's conduct was that of a complaining witness and not that of a judge (Pet. at 9), Barrett improperly focuses on the act itself and the identity of the actor, rather than, as did the Court of Appeals, "look[ing] to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13. Second, Barrett persists in alleging that Judge Harrington's motives for writing the letters were taken out of bad faith because she allegedly knew the stalking statute did not apply to Barrett's conduct. (Pet. at 15). However, as succinctly stated by the Court of Appeals:

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5. It should be noted that the allegation by Mr. Barrett that he has not engaged in unlawful conduct has no relevance to whether, as found by the Court of Appeals, any conduct by Mr. Barrett could be perceived by others, such as Joan Nixon or Larry Brinton, as being intimidating or threatening. Moreover, Barrett admits that he "has no way of knowing whether [Judge Harrington] was, as she claims, in fact scared." (R.15 Second Amended Complaint at p. 10, ¶ 29(d)).

> This allegation does not undermine the application of the immunity for several reasons: first, although Harrington alluded to the stalking law in her letters, she specifically complained of obstruction of justice in relation to her role as a judge; second, because of the functional analysis we do not focus on the particulars of the act; third, the Supreme Court has clearly ruled that immunity "is not overcome by allegations of bad faith or malice. . . ." *Mireles*, 502 U.S. at 11.

(Pet. App. 31 n.20). Third, Barrett appears to conclude that because Judge Harrington would, pursuant to state statute, necessarily not be involved in the appeal of the original September 1994 Environmental Court proceedings at issue, any conduct by Judge Harrington after that hearing is automatically not a "judicial action." (Pet. at 4 n.1). This logic is consistent with his ignoring the material relevance of his ongoing feud with the Codes Department and the potential need for Judge Harrington to recuse herself from future Environmental Court proceedings involving Barrett. However, as recognized by the Court of Appeals and consistent with decisions by this Court,

> the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, ipso facto, non-judicial acts.

(Pet. App. at 32). *See, e.g., Forrester*, 484 U.S. at 227-28.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURT OF APPEALS OR ANY PREVIOUS DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.

Barrett appears to contend that the decision of the Court of Appeals is in conflict with existing decisions of other United States court of appeals and previous decisions of the Sixth Circuit Court of Appeals (Pet. at 12-15). Stressing that a "relevant criterion" in these cases is the question of a "judge's motivation," Barrett concludes that the cases cited indicate that his allegation that Judge Harrington was motivated by bad faith precludes a finding of a judicial act. However, as previously stated and found by the Court of Appeals, this Court has clearly ruled that immunity "is not overcome by allegations of bad faith or malice. . . ." *Mireles*, 502 U.S. at 11. In addition, each case cited by Barrett has either been disapproved, is distinguishable, or has been misstated in the Petition.

Barrett's reliance on *Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir. 1981) is misplaced because the case is clearly distinguishable. Unlike the instant matter, the *Harper* court found that the second prong of the *Stump* analysis was not met, *i.e.*, the expectations of the parties. Moreover, the United States Court of Appeals for the Fifth Circuit has subsequently disapproved the comments in *Harper* related to the motivations of a judge and upon which Barrett relies. In *Adams v. McIlhany*, the Fifth Circuit Court of Appeals noted, in part,

> [*Harper*] restricted its holding denying immunity to the "exceedingly narrow and . . . rarest of factual settings." (citation omitted). Accordingly, that case,

> by its own terms, is virtually without precedential value. In addition, *we note that Harper's reliance on the "motives" of the judge is inconsistent with McAlester, Bradley, Stump, and Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 l. Ed. 2d 396 (1982).*

764 F.2d 294, 298 (5th Cir. 1985) (emphasis added).

Barrett's reliance on *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), is likewise misplaced. This case is clearly distinguishable in that, unlike the matter before this Court, none of the alleged conduct by the judge in *Harris* related to that judge's efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27). The Court of Appeals in the matter before this Court did rely upon *Harris* in its determination that "when Judge Harrington communicated to the media regarding Mr. Barrett, she stepped out of her judicial role, and is not entitled to absolute judicial immunity for those acts." (Pet. App. 36). However, the Court of Appeals rightly distinguished these types of communications, as well as similar circumstances in *Harris,* from the circumstance involving the "filing [of] a complaint with law enforcement concerning a disgruntled litigant who is harassing a judge." (Pet. App. at 36). The Court of Appeals states,

> The distinction here is a clear one. When a judge makes a complaint to law enforcement concerning a litigant's conduct which is adversely affecting or obstructing the judicial process, that judge is requesting some official action in connection with the judicial process.

(Pet. App. at 36).

Barrett's reliance on *Malina v. Gonzales*, 994 F.2d 1121 (5th Cir. 1993), is equally misplaced. Again, unlike the circumstances in the instant matter, *Malina* is not concerned with circumstances related to that judge's efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27). In addition, contrary to Barrett's "motivation" argument, the *Malina* court expressly follows this Court in stating that within the context of the two-prong "functional" analysis, "It is important to note that 'judicial immunity is not overcome by allegations of bad faith or malice.' It is the Judge's actions alone, not intent, that we must consider." *Malina*, 994 F.2d at 1125.

Further, Barrett's reliance on *King v. Love*, 766 F.2d 962 (6th Cir. 1985), and *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984), is also misplaced. Similar to his improper focus in the instant matter on the identity of the actor and the act itself instead of "look[ing] to the particular act's relation to a general function normally performed by a judge," *Mireles*, 502 U.S. at 13, Barrett incorrectly focuses on the fact that in these two cases the judges initiated arrests or accusatory processes. (Pet. at 13-14). Again, however, unlike the instant matter, these cases are not concerned with circumstances related to those judges' efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27).

Finally, Barrett's alleged distinction in *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), does not actually serve as a relevant distinction, but rather betrays Barrett's attempt to confine "judicial acts" to those acts that occur "during the course of a [single] trial." (Pet. at 14-15). This necessarily flawed attempt is consistent with Barrett's ignoring the material relevance of his ongoing feud with the Codes Department and the potential need for Judge Harrington to recuse herself from future Environmental Court proceedings involving Barrett. However,

as recognized by the Court of Appeals and consistent with decisions by this Court,

> the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, ipso facto, non-judicial acts.

(Pet. App. at 32). *See, e.g., Forrester*, 484 U.S. at 227-28.

III.

BARRETT'S PRESENTATION OF THE HOLDING IN *KALINA v. FLETCHER* IS CLEARLY INCORRECT AND MISPLACED.

As part of his overall theme of the importance of alleged false statements related to the initiation of arrests or complaints to law enforcement officials, Barrett relies on *Kalina v. Fletcher*, 522 U.S. __, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997), for the proposition that "this Court has held that a prosecuting attorney is not entitled to absolute immunity *for making false statements of fact* in an affidavit supporting an application for an arrest warrant." (Pet. at 9 (emphasis added)). Barrett appears to thus conclude that the reason immunity was not granted in this case is because the prosecuting attorney made false statements. However, this is simply not the holding of the case.

In *Kalina*, this Court was faced with determining whether a prosecuting attorney was entitled to absolute immunity in connection with the preparation and filing of (1) an unsworn information charging burglary; (2) an unsworn motion for an arrest warrant; and (3) a "Certification for Determination of Probable Cause" in which she summarized the evidence

supporting the charge and swore to the truth of the alleged facts under penalty of perjury. 139 L. Ed. 2d at 475-76. Consistent with this Court's analysis of absolute judicial immunity, the *Kalina* court recognized that the determination of prosecutorial immunity requires the examination of "the nature of the function performed." *Id.* at 480. Consequently, this Court held that the preparation and filing of the information and the motion for an arrest warrant served the function of an advocate. *Id.* In addition, this Court found that the prosecuting attorney's drafting of the certification itself also served the function of an advocate. *Id.* at 481-82. This Court reasoned that such activities involved the exercise of the advocate's professional judgment and that, up to this point, the prosecuting attorney would be entitled to immunity. *Id.* However, this Court held that the act of personally attesting to the truth of the averments in the certification did not involve the exercise of that professional judgment because "that judgment could not affect the truth or falsity of the factual statements themselves." *Id.* As a result, and contrary to Barrett's assertion, this Court did not withhold immunity because the statements turned out to be false, but rather because, under the specific facts of the case, the "function" served by the swearing under penalty of perjury was the "function" of a witness, regardless of whether it was done by an attorney or layperson. By way of further distinction, in the instant matter before this Court, it is uncontroverted that Judge Harrington has never caused a warrant or formal charge to be taken out against Barrett. (R.22 Appendix, Collective Exhibit C at pp. 172-73; Pet. App. at 83).

Accordingly, just as Barrett has mistakenly focused on the particularities and peculiarities of the conduct of Judge Harrington in the instant matter without properly "look[ing] to the particular act's relation to a general function normally performed by a judge," so, too, has he focused only on the particularities and peculiarities of the conduct of the prosecuting

attorney in *Kalina* rather than on the relation of the conduct to the general function normally performed by a prosecutor. *See Mireles*, 502 U.S. at 13.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — AFFIDAVIT OF JOAN A. NIXON DATED FEBRUARY 12, 1996

STATE OF TENNESSEE)
) SS:
COUNTY OF DAVIDSON)

AFFIDAVIT

The Affiant, Joan A. Nixon, upon affirmation, makes the following Affidavit from her own personal knowledge and belief.

1. I am executive secretary to the Davidson County Election Commission.

2. I have held this position for about ten years.

3. On February 1, 1995, Frank Barrett appeared in the Election Commission offices and made request for certain documents regarding Judge Penny Harrington.

4. While Mr. Barrett was in our offices and in the course of making these requests, Mr. Barrett used profanity to the extreme.

5. Most of his profanity was directed at Judge Harrington.

6. Mr. Barrett expressed personal hatred for Judge Harrington.

7. Among other things, he screamed that Judge Harrington was a "conniving bitch" and that she was making his life miserable.

Appendix A

8. Mr. Barrett continued to pace around the office, staring very angrily at me and others and scaring all of us.

9. I believed that he was so angry that he might physically attack me.

10. His language and behavior made me most uncomfortable and frightened, not only for myself but for others around me and for Judge Harrington.

11. I did provide the documents that Mr. Barrett requested.

12. Mr. Barrett's behavior caused me to remember having read in the newspaper that, at some time in the past, Judge Harrington had been the victim of a stalker.

13. Because of Mr. Barrett's behavior and my own fears, I called Judge Harrington two times on February 1, 1995 to report his erratic behavior and my concern for her safety.

14. I told Judge Harrington that Mr. Barrett was acting very angrily and that I was physically frightened for myself and for Judge Harrington.

15. I also told my superior, Michael McDonald, about Mr. Barrett and he told me that the next time Mr. Barrett came in, I should refer Mr. Barrett to Mr. McDonald.

16. On February 2, 1995, because of a phone call made by Mr. Barrett to our office in which he again displayed extremely belligerent behavior, I again called Judge Harrington to express my personal fear for the safety of myself, other ladies in this office and for Judge Harrington.

Appendix A

17. Although I have worked professionally with Judge Harrington, I have no personal relationship with her.

18. FURTHER AFFIANT SAITH NAUGHT.

/s/ Joan A. Nixon
JOAN A. NIXON

APPENDIX B — EXCERPTS FROM DEPOSITION OF NANCY ILENE HARRINGTON DATED JANUARY 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:95-0214

FRANK BARRETT,

Plaintiff,

vs.

NANCY I. HARRINGTON, a/k/a
PENNY HARRINGTON,

Defendant.

EXCERPTS FROM DEPOSITION OF NANCY ILENE HARRINGTON

DATE: JANUARY 15, 1996

TIME: 10:15 A.M.

LOCATION: 2016 EIGHTH AVENUE SOUTH
NASHVILLE, TENNESSEE

* * *

[p. 236] nearest police station if I ever saw Mr. Barrett around me, the natural — the natural feeling would be that it's physical.

Q. So you do recall Judge Faimon saying get to a police officer if he comes around?

A. Right. It was either Judge Faimon or Opie. I'm not really sure. They were talking kind of at the same time, and it was one or the other of them.

Q. Did you mention Opie to Jay Korff?

A. I don't know.

Q. Did you tell Mr. Korff that Mr. Barrett had stopped lurking after police had told him to leave you alone?

A. I don't remember what I told Mr. Korff.

Q. Do you recall using words to that effect?

A. I may have because I felt that he had.

Q. Has anyone with the Police Department ever told you that they told Mr. Barrett to leave you alone?

A. Anna Marie Williams told me that she told him just to stay away from me, and he said he was going to continue looking at the public records, that was his right.

And she said, well, you can do that, just stay away from her, you're scaring her. And after that he did.

Appendix B

After that she came to me, and said how do you want to dispose of this file. And as I have told you before, I told her to close it.

Q. Did you tell Mr. Korff that Mr. Barrett had leaked a story about you with regard to the Broadway Dinner Train?

A. I think he asked me if I knew where that story might have come from, because someone anonymously came to the station and told them that.

And the only person I know who had been trying to find out things about me was Mr. Barrett.

Q. So did you believe Mr. Barrett to have been the source of that story?

A. He was the only person that I know who might have done that.

Q. Had Channel 2 at that time run a story involving you and the Broadway Dinner Train?

A. I don't think so.

* * *